STATE OF MICHIGAN

COURT OF APPEALS

PAMELA WELLS and KATHLEEN ANSCHUETZ,

Plaintiffs-Appellants,

and

RUBY HAWKINS-JACK,

Plaintiff,

v

FAMILY INDEPENDENCE AGENCY, WILLIAM DENEMY and RONALD PHILBURN,

Defendants-Appellees,

and

HOLLY M. HUSSAIN,

Defendant.

UNPUBLISHED
September 12, 2006

No. 256818
Iosco Circuit Court
LC No. 03-000258-CL

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Plaintiffs appeal from a judgment of the circuit court entered upon a jury verdict that awarded no damages to plaintiffs. We affirm in part and remand in part.

Plaintiffs' claims arise out of their employment with defendant Family Independence Agency and alleged harassment by a co-worker, defendant Philburn. All of plaintiffs' claims, except for a claim of assault, were dismissed by summary disposition. After a jury trial, the jury returned a verdict in favor of defendants on the claims of assault, but found that defendant had battered plaintiff Wells by striking her in the back with his elbow. But the jury found that Wells had suffered no damages as a result and gave an award of zero.

Plaintiffs first argue that the trial court erred in dismissing their hostile work environment claim. We disagree. We review rulings on motions for summary disposition de novo.

McClements v Ford Motor Co, 473 Mich 373, 380; 702 NW2d 166 (2005). A motion under MCR 2.116(C)(10) tests the factual support for a claim and summary disposition in favor of the defendant is appropriate if, when viewing the evidence in the light most favorable to the plaintiff, the evidence fails to establish a claim as a matter of law. *Id.*

There are five necessary elements to establish a prima facie case of a hostile work environment: (1) the employee belongs to a protect group, (2) the employee was subject to conduct or communication on the basis of sex, (3) the employee was subjected to unwanted sexual conduct or communication, (4) the unwanted conduct or communication was intended to, or in fact did, interfere with the employee's employment or created an intimidating, hostile or offensive work environment, and (5) respondeat superior. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

With respect to plaintiff Wells, we are not persuaded that she can establish the third prong of the test, that she was subjected to unwanted sexual conduct or communication. Of all of the allegations of improper conduct by Philburn, the only ones which were of a sexual nature were two comments that Philburn made to Anschuetz that Wells must be performing oral sex on a supervisor because of the frequency of her visits to the supervisor's office. But these comments, at most, subjected Anschuetz to an unwanted sexual communication, not Wells. Therefore, Wells cannot satisfy this prong of the *Radtke* test.

While these comments arguably satisfy the third prong of the test with respect to Anschuetz, we are not persuaded that Anschuetz would be able to establish factual support for the fourth prong, that the communication had the intent or effect of interfering with her employment or in creating a hostile work environment. In *Radtke, supra* at 394, the Supreme Court held that "whether a hostile work environment existed shall be determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." Furthermore, the Court noted that, while a hostile work environment may be established based upon a single incident, such a case is rare and must be based upon extreme conduct, such as rape or violent sexual assault. *Id*. at 394-395. Normally, it must be that "a continuous or periodic problem existed or a repetition of an episode was likely to occur." *Id.* at 395. The Court also noted that conduct by an employer may create a hostile work environment, while the same conduct by a co-worker may not be sufficient to do so. *Id.* Indeed, while the Court in *Radtke* found that the single incident involving an assault by the employer was sufficient to submit the question to the jury, this Court in *Langlois v McDonald's Restaurants of Mich, Inc*, 149 Mich App 309, 317-318; 385 NW2d 778 (1986), found that a single incident where a coworker placed his hand on the plaintiff's breast and buttocks was insufficient to establish a hostile work environment.

Here, we have two incidents in which Philburn made a sexual comment. While obviously not a single incident, it is difficult to classify them as repetitious or continuous conduct either. Moreover, while the comments were tactless, they hardly are at the same level of seriousness as physical contact with an intimate part of the body or attempted coercion of sexual

relations. Further, they involved comments about a third person's alleged sexual activities, not the listener's activities.[1] Given these circumstances, we are not persuaded that Anschuetz can establish the creation of a hostile work environment or interference with her employment.

Finally, plaintiffs argue that they are not merely arguing that there was a hostile work environment based upon sexual harassment, but that there was a gender-based hostile work environment. The Supreme Court in *Haynie v Dep't of State Police*, 468 Mich 302, 317-319; 664 NW2d 129 (2003), did note that a hostile work environment claim might be based upon something other than sexual conduct. The Court declined to address the question whether that is the case because the claims in *Haynie* only involved claims of sexual harassment.

We too decline to take up the question whether the Civil Rights Act would support a hostile work environment claim not involving conduct of a sexual nature. While plaintiffs' original complaint made general claims that the law provides protection against hostile work environments, without pleading what law creates such a protection, by the time the issue was focused in plaintiffs' second amended complaint, the claims were specifically invoking the Civil Rights Act with a claim of sexual harassment creating a hostile work environment. Furthermore, the arguments at the motion for summary disposition and in the original briefing in this Court focused on the claim that a hostile work environment was created due to harassment of a sexual nature by Philburn. Plaintiffs did not advance their theory of a hostile work environment based on non-sexual conduct until their reply brief on appeal. We will not consider an issue raised for the first time on appeal. *Hall v Small*, 267 Mich App 330, 335; 707 NW2d 191 (2005).

For that matter, plaintiffs' reply brief does not even set out an argument that a sexual discrimination claim of a hostile work environment may be based upon anything other than sexual conduct. Indeed, plaintiffs do not even cite to *Haynie*'s observation that such claims might be viable. Rather, plaintiffs again resort to making vague and conclusory arguments that the law prohibits hostile work environments in general without developing an argument or citation to authority for such claims. Therefore, even if preserved, the issue is not adequately presented on appeal to afford appellate review. *Hall, supra*.

For the above reasons, we are not persuaded that the trial court erred in its partial grant of summary disposition.

Plaintiffs next argue that the trial court erred in failing to consider affidavit evidence submitted in defense of the motion for summary disposition. Based upon the trial court's comments at the hearing, it is unclear whether the trial court considered the evidence or not. But, in any event, at most any error by the trial court was harmless and the issue is moot. Even considering all of plaintiffs' proffered evidence, for the reasons discussed above, defendants were entitled to summary disposition. That is, even if the trial court did not consider the evidence and should have, it does not change the result on appeal.

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[1] And it might even be argued that, in the context they were made, the comments were not intended to be, nor taken as, literally true, but merely a vulgar and tasteless expression of disrespect.

Finally, plaintiffs argue that the trial court erroneously entered a judgment of "no cause of action" on plaintiffs' battery claims because the jury found that Philburn had committed battery upon Wells, although they awarded no damages. Although it is unclear to us of what importance the distinction is, plaintiffs are correct that the judgment should have been entered as a judgment for plaintiff Wells, but which awarded no damages. On remand, the trial court should modify the judgment accordingly.

Affirmed in part and remanded in part. We do not retain jurisdiction. Defendants may tax costs.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

I concur in result only.

/s/ Alton T. Davis